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CHARLES LEIGHT SAGLEY
CLERK

IN THE
Supreme Court of the United States

..... TERM, 1943

No. **13** ..Original

In the Matter
of the

Petition of the REPUBLIC OF PERU, owner of the Peruvian
Steamship "UCAYALI," for a writ of prohibition and/or
a writ of mandamus against the Honorable WAYNE
G. BORAH, Judge of the District Court of the United
States for the Eastern District of Louisiana, New
Orleans Division, and the other judges and officers of
said court.

**PETITION FOR A WRIT OF PROHIBITION
AND/OR A WRIT OF MANDAMUS**

MONROE & LEMANN,
HAIGHT, GRIFFIN, DEMING & GARDNER,
Proctors for the Republic of Peru.

HERBERT M. STATT,
LINDSAY D. HOLMES,
of Counsel.

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Petition of the REPUBLIC OF PERU, owner
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**MOTION FOR LEAVE TO FILE PETITION
FOR WRIT OF PROHIBITION AND/OR
A WRIT OF MANDAMUS**

And now comes the Republic of Peru, owner of the Peruvian steamship Ucayali, and moves:

1. For leave to file the petition for a writ of prohibition and/or a writ of mandamus hereto annexed, and

2. That a rule be entered and issued directing the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, and the Honorable Wayne G. Borah, Judge thereof, and the judges and officers of said Court to show cause why a writ of prohibition and/or a writ of mandamus should not issue against them and each of them, in accordance with the prayer of said petition, and why the Republic of Peru should not have such other and further relief therein as may be just.

THE REPUBLIC OF PERU,

By MONROE & LEMANN,

HAIGHT, GRIFFIN, DEMING & GARDNER,

Its Proctors

By EDGAR R. KRAETZER.

4 IN THE
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WAYNE G. BORAH, Judge of the District
Court of the United States for the
Eastern District of Louisiana, New
Orleans Division, and the judges and
officers of said court.

**PETITION FOR A WRIT OF PROHIBITION
AND/OR A WRIT OF MANDAMUS**

6 *To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:*

The petition of the Republic of Peru, owner of the Peruvian steamship Ucayali, against the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, sitting in admiralty, and against the judges and officers of said Court, respectively represents:

FIRST: That on March 30, 1942, Galban Lobo Company, S. A., alleging that it was a corporation organized and existing under and by virtue of the laws of the Republic of Cuba, filed a libel in the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, against Compania Peruana de Vapores

y Dique del Callao and the steamship Ucayali, her engines, 7
boilers, etc., to recover damages in the sum of \$100,000,
alleged to have been sustained by it as charterer of the
vessel and consignee of her cargo, as a result of the dis-
charge of the cargo of said vessel at New Orleans instead
of New York, the destination to which the vessel had
originally been ordered. The libel prayed that process
issue for the seizure, arrest and attachment of the said
steamship Ucayali according to the rules and practice of
said Court, and that said vessel be condemned and sold
to pay said alleged damages. A copy of the libel, as part
of the record of the proceedings in said Court, is hereto
annexed.

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SECOND: That, in point of fact, the steamship Ucayali
was, since the year 1937, and still is solely and wholly
owned by the Republic of Peru and at all the times men-
tioned in the libel annexed hereto, the vessel belonged
to the Republic of Peru. That at the time of the occur-
rences as a result of which libelant claims damage was
occasioned to it by the vessel and her owner, to wit, the
diversion to New Orleans as her discharging port and her
discharge at New Orleans, the vessel was employed in the
transportation of privately owned merchandise from the
Republic of Peru to the United States for the public use
and benefit of the Republic of Peru and for her imme-
diate subsequent employment was under contract to trans-
port war materials for the United States Army.

9

THIRD: That thereafter and on or about the 9th day of
April, 1942, in order to free the vessel from libelant's
seizure and in order to enable her to perform her engage-
ment for the transportation of war materials for the United
States Army without undue delay, Francisco Olsen, the
master of the steamship Ucayali, made and filed his claim
in behalf of the Republic of Peru to the said vessel but
without prejudice to or waiver of the defense of sovereign
immunity. A copy of said claim as part of the record

- 10 of the proceedings in the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, is hereto annexed.

FOURTH: That thereafter and on or about April 11, 1942, the testimony of Francisco Olsen, master of the steamship Ucayali, was perpetuated in behalf of the Government of the Republic of Peru, de bene esse, for the purpose of showing that the diversion from New York to New Orleans was caused by war conditions, making it unsafe and imprudent for the vessel to proceed to the destination to which she was originally ordered, all within the terms of the charter party and bills of lading issued for the goods. The testimony of Captain Olsen was perpetuated at that time and without awaiting a determination of the motion of the Republic of Peru for a dismissal of the libel on the ground of sovereign immunity for the reason that under present war conditions, the dangers of the seas are so great that it was doubtful whether the said witness would survive a voyage to South America through waters infested by enemy submarines. The testimony was taken under the reservation that it was without waiver of the defense of the Republic of Peru of sovereign immunity, which reservation was not agreed upon by proctors for libelant. In point of fact, steps for the proper and formal institution of the plea of and motion with respect to the defense of sovereign immunity had been instituted prior to the taking of Captain Olsen's deposition on April 11, 1942, to wit, on April 3, 1942, but due to the necessity for the intervention of the Peruvian Government through the Peruvian Embassy, of the Department of State of the United States, and of the United States Attorney General, those measures could not be completed before the departure of Captain Olsen and the steamship Ucayali for the purposes and on the business aforesaid.

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A copy of the transcript of the deposition of Captain Olsen as part of the record of the proceedings in the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, is hereto annexed.

FIFTH: That thereafter, on various dates, New Orleans proctors for the Republic of Peru obtained three extensions of time within which to answer or otherwise plead to the libel herein, which extensions were required by the necessity of communications between New Orleans and New York proctors for the Republic of Peru, communications between the New York proctors for the Republic of Peru with the officials of that Government in Peru and, most particularly, time to prepare and present the claim of the Republic of Peru for sovereign immunity. The longest delay was occasioned by exchanges of communications between the United States Attorney's office in New Orleans and the Attorney General's office in Washington; without such delay, the extensions of time might not have been necessary, and the Government of Peru might have been able to make its plea of sovereign immunity in proper season. 13 14

SIXTH: That thereafter, pursuant to the practice and procedure established in such cases, the Republic of Peru, through the Peruvian Ambassador to the United States, filed its suggestion with the Secretary of State of the United States that it was interested in such proceedings, desired the discontinuance of the action pending and the dismissal of the libel on the ground that the vessel was owned and operated by a friendly sovereign power in the service and interest of the people of the Republic of Peru. The Secretary of State thereupon and under date of May 5, 1942, requested the Attorney General of the United States to instruct the United States District Attorney in New Orleans to present to the Court a certified copy of the suggestion and note of the Ambassador of the Republic of Peru and to state that the Department of State accepts as true the statements of the Ambassador concerning the steamship Ucayali and that the Department of State recognized and allowed the claim of immunity. 15

SEVENTH: That thereafter, Herbert W. Christianberry, the United States Attorney for the Eastern District of

16 Louisiana, appearing on behalf of the United States for the purpose of presenting the suggestion of immunity of the Peruvian Ambassador, filed of record suggestions that inasmuch as the Ucayali at the time of the matters complained of in the libel, was a vessel belonging to the Republic of Peru, the claim of immunity from liability or lien for alleged breach of contract was recognized and allowed. Copy of said suggestion, as part of the record of the proceedings in said Court, is hereto annexed.

17 EIGHTH: That thereafter, on motion of Herbert W. Christenberry, United States Attorney for the Eastern District of Louisiana, and of proctors in New Orleans for the Republic of Peru, the matter came on for hearing before the Honorable Wayne G. Borah, Judge of the said Court, upon the right and propriety of said Court to assume jurisdiction or otherwise to hear and determine the matters alleged in said libel, who handed down an opinion in which the suggestion of immunity heretofore referred to, was overruled on the ground that the Republic of Peru had, notwithstanding the reservations to the contrary made by the proctors for the Republic of Peru, entered a general appearance in the said cause by obtaining extensions of time within which to answer or otherwise plead and by taking the deposition of Captain Olsen, and waived its immunity to suit. The Court assumed jurisdiction and is proceeding to hear and determine the merits of the libel. A copy of said opinion, as part of the record of proceedings in said Court, is hereto annexed.

18 NINTH: Thereafter, the Republic of Peru, by its proctors at New Orleans, moved for reargument of the motion for dismissal of the libel on the ground of sovereign immunity and, upon reargument, the previous decision of the Court was affirmed. A copy of the decision of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, as part of the record of the proceedings in said Court, is hereto annexed.

TENTH: That a certified copy of the record of the proceedings in said District Court of the United States for the Eastern District of Louisiana, New Orleans Division, filed in the said cause, is hereto annexed and made a part hereof. 19

ELEVENTH: That it is now represented that inasmuch as at all the times referred to in the libel in the cause the Ucayali was the property of the Republic of Peru employed by this sovereign for the public uses and benefit of the people of the Republic of Peru, and since the claim to immunity of the Republic of Peru, a friendly sovereign nation, was recognized and allowed by the Government of the United States, through the Secretary of State, she was immune from liability or lien for the alleged damages for breach of charter. Further, that said libel proceedings, in substance and effect, are an action against your friendly sovereign petitioner and present a claim for contract damages arising out of the diversion from a route to New York, to New Orleans because of the then existing submarine menace, and consistent with the practices then employed by the United States Maritime Commission and pursuant to the official orders and directions of the Ministry of Marine of Peru, the Peruvian Government agency having jurisdiction in the premises; and that for the liability of such losses this sovereign petitioner has not consented to suit. By reason thereof, the said District Court was and is without jurisdiction, or should not with propriety have retained jurisdiction, to hear and determine the matters alleged in said libel filed against the said steamship. 20 21

WHEREFORE, the said Republic of Peru, the aid of this Honorable Court respectfully requesting, prays:

1. That a writ of prohibition may issue out of this Honorable Court to the said Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, and/or the judges and officers of said Court, prohibiting

22 him and them from taking any step whatsoever in the cause aforesaid and, generally, from the further exercise of jurisdiction therein or the enforcing of any order, judgment or decree made under color thereof.

23 2. That a writ of mandamus be issued out of and from this Honorable Court directing and commanding the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, to vacate the order so entered by him overruling the exception of the Republic of Peru to jurisdiction, and to enter an order in said cause declaring the said steamship Ucayali immune from liability or lien for the damages claimed in the libel.

3. That the Court grant to the Republic of Peru such other and further relief as may be just in the premises.

THE REPUBLIC OF PERU,

By MONROE & LEMANN,

HAIGHT, GRIFFIN, DEMING & GARDNER,

Its Proctors

By EDGAR R. KRAETZER.

24 I have read the foregoing petition by me subscribed, and the facts therein stated are true to the best of my information and belief.

EDGAR R. KRAETZER.

Sworn to before me this
8th day of January, 1943.

JOHN T. CASEY,
Notary Public.

JOHN T. CASEY
Notary Public Queens County
Queens Co. Clk's No. 338 Reg. No. 3440
N. Y. Co. Clk's No. 816 Reg. No. 4C484
Commission Expires March 30 1944
Notarial Seal

Libel and Complaint.

25

**UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA,
New Orleans Division.**

GALVAN LOBO Co., S. A.

versus

**COMPANIA PERUANA DE VAPORES Y DIQUE
DEL CALLAO**

and

**The Steamship "UCAYALI," her engines,
boilers, etc.**

**No. 562
In Admiralty**

26

**To the Honorable the Judges of the United States District
Court for the Eastern District of Louisiana:**

The libel and complaint of Galvan Lobo Co., S. A. against Compania Peruana de Vapores y Dique Del Callao, and against the Steamship UCAYALI, her engines, boilers, etc., in a cause of contract, civil and maritime, alleges as follows:

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I.

At all the times hereinafter mentioned, libelant was and still is a corporation organized and existing under and by virtue of the laws of the Republic of Cuba, and was at all times hereinafter mentioned the charterer of the Steamship UCAYALI.

II.

At all the times hereinafter mentioned, respondent, Compania Peruana de Vapores y Dique Del Callao, was

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Libel and Complaint.

and now is a corporation organized and existing under and by virtue of the laws of the Republic of Peru, and was at all the times hereinafter mentioned the owner of the Steamship UCAYALI.

III.

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On or about the 18th day of November, 1941, respondent, Compania Peruana de Vapores y Dique Del Callao, entered into a charter party with libelant's agent at Callao, Peru, Enrique, Pardo, whereby the said respondent agreed to let and the said libelant agreed to hire the said Steamship UCAYALI for a voyage from ports in Peru to the Port of New York the carriage of 3,600 to 3,700 tons of raw or refined sugar in bags at a freight of \$15.00, United States currency, per ton, seventy-five per cent. (75%) of which freight became due and payable at Lima, Peru, upon loading and the balance at New York, upon discharge of the vessel. A copy of said charter party marked "Exhibit A" is annexed hereto.

IV.

30

The Steamship UCAYALI commenced to load at Peruvian ports on or about March 2, 1942, and seventy-five per cent. (75%) of the agreed freight was thereafter paid by libelant to respondent in accordance with the terms of said charter party.

V.

That on or about March 6, 1942, the said Steamship UCAYALI having loaded 3,600 tons of raw and/or refined sugar in bags, all of which sugar was the property of your libelant sailed from the Port of Pimentel, Peru, for the port of New York, where she was to have discharged said sugar in accordance with the terms of said charter party.

Libel and Complaint.

VI.

That for reasons unknown to your libelant, the Steamship UCAYALI, with libelant's sugar on board, put into the Port of New Orleans, Louisiana, on or about the 23rd day of March, 1942, and at all times thereafter wrongfully refused to proceed to the Port of New York as required by said charter party and contrary to the terms of said charter party and contrary to the instructions of your libelant, discharged libelant's sugar into warehouses at the Port of New Orleans.

VII.

In the alternative, in the event that this deviation to and discharge at New Orleans does not constitute an unexcused, breach of the charter party, then libelant alleges that it is entitled to the return of the freight heretofore paid to respondent hereunder, or that may hereafter be received or obtained by respondent hereunder, by payment or otherwise.

VIII.

That the existing regulations of the Government of the United States of America with respect to the importation and transportation of sugar from foreign ports to the East Coast of the United States, require that all deliveries of imported sugar from other than Cuban ports be made to ports north of Cape Hatteras; hence, libelant is unable to take delivery of the sugar discharged by the Steamship UCAYALI at New Orleans.

IX.

Libelant has duly performed all and singular the obligations resting upon it under the charter party herein.

Libel and Complaint.

X.

By reason of the premises libelant has sustained losses and damages in the estimated amount of One Hundred Thousand Dollars (\$100,000.00), no part of which has been paid, although payment has been duly demanded from the respondent by the libelant.

XI.

35 That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libelant prays:

1. That process in due form of law according to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the Steamship UCAYALI, her engines, etc., and that all persons having or claiming any interest therein may be cited to appear and answer in the premises;

36 2. That citation in due form of law may issue against the respondent herein, Compania Peruana de Vapores y Dique Del Callao, citing it to appear and answer in the premises; that if respondent cannot be found within this district, its goods and chattels, and in particular the Steamship UCAYALI, may be attached by process of foreign attachment for the amount of One Hundred Thousand Dollars (\$100,000.00) plus interest and costs;

3. That this Honorable Court may be pleased to decree the payment of said respondent to the libelant its damages;

4. That the said Steamship UCAYALI may be condemned and sold to pay the same, together with interest and costs; and

Libel and Complaint.

37

5. That libelant may have such other and further relief in the premises as may be just and proper.

Signed TERRIBERRY, YOUNG, RAULT & CARROLL,
TERRIBERRY, YOUNG, RAULT & CARROLL,
825 Whitney Building,
New Orleans, Louisiana.

Signed MICHELSEN & CHAMBERLAIN,
MICHELSEN & CHAMBERLAIN,
55 Liberty Street,
Borough of Manhattan,
City, County, and
State of New York.

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Verification.

State of Louisiana, }
 Parish of Orleans, } ss.:

BEFORE ME, the undersigned authority, personally came and appeared BENJAMIN W. YANCEY, Who having been first duly sworn did depose and say:

41

That he is a member of the firm of Terriberry, Young, Rault & Carroll, proctors for libelant; that he has read the foregoing libel, and the matters contained therein are true and correct to the best of his knowledge, information, and belief; that the basis of his belief and the source of his knowledge are statements made to him and papers sent to him by New York counsel for libelant. The reason this affidavit is not made by libelant is that libelant is not in this district and has no agent herein.

Sgd. BENJAMIN YANCEY.

Sworn to and subscribed before
 me this 30th day of March, 1942.

Sgd. HAROLD J. ZENINGER
 Notary Public

42 (Seal)

Order:

Let admiralty process issue as prayed for.

New Orleans, La., March 30, 1942.

A. DALLAM O'BRIEN, JR.,
 Clerk.

By H. W. NIEHUES,
 Dep. Clerk.

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Exhibit A—Annexed to Libel and Complaint.

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